KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900

FACSIMILE
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
JEFFREY A. LAMKEN
AUSTIN C. SCHLICK

July 5, 1996

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: *Open Video Systems, CS Docket No. 96-46*

Dear Mr. Caton:

Enclosed for filing please find an original and five copies of the Petition of Tele-TV for Reconsideration in the above-captioned matter.

Please date stamp the extra copy and return it to the individual delivering this package. Thank you for your assistance in this matter.

Yours sincerely,

Michael K. Kellogg

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
	)	
Open Video Systems	)	

PETITION OF TELE-TV FOR RECONSIDERATION

Michael K. Kellogg
Austin C. Schlick
Kevin J. Cameron
Kellogg, Huber, Hansen,
Todd & Evans
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Karen Stevenson
TELE-TV
875 Third Avenue
15th Floor
New York, NY 10022
(212) 508-4000

Counsel for TELE-TV

July 5, 1996

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SUMMARY

Although it generally supports the Commission's Second Report and Order, TELE-TV seeks reconsideration on two grounds.

First, whereas Congress sought to encourage level competition among multiple programming providers on open video systems, the Second Report and Order stacks the deck against programming providers that are affiliated with OVS operators. It requires that such providers comply with the nondiscrimination requirements of section 653(b)(1)(E) in all cases, potentially placing them at a serious disadvantage vis-a-vis other programming providers on the same open video system.

This burden is inconsistent with the text of the statute. Section 653(b)(1)(E) draws a clear distinction between OVS operators and their affiliated programming providers: The former are subject to nondiscrimination requirements, while the latter are not. Because nondiscrimination goals can be achieved consistent with this statutory scheme, the Commission should reconsider its decision to subject operator-affiliated programming providers to unnecessary and competitively crippling nondiscrimination requirements.

Second, the Commission should reconsider its conclusion that broadcast stations need not make the same election between must-carry and retransmission consent for open video systems and cable systems that compete for the same subscribers. In order to encourage competition in the market for video programming distribution, Congress has sought to ensure that OVS operators

are treated, to the extent possible, in the same manner as cable operators under the must-carry and retransmission consent rules. Yet the Commission has determined that broadcasters need not treat OVS operators in the same way that they treat cable operators.

The Commission's explanation for this disparate treatment -- that open video systems might one day cover territories larger than cable franchise areas -- is manifestly insufficient to justify allowing broadcasters to discriminate against OVS operators. Instead, the Commission should require broadcasters to make the same election for overlapping open video systems and cable systems to the extent of the overlap. Where cable operators and OVS operators are in direct competition for the same subscribers, broadcasters should be required to make the same election -- either must-carry or retransmission consent -- for both, provided that the open video system operator certifies it will operate in conformity with that election.

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Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
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PETITION OF TELE-TV FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's rules, TELE-TV requests that the Commission reconsider in part its Second Report and Order, Implementation of Section 302 of the Telecommunications Act of 1996 -- Open Video Systems, CS Docket 96-46 (FCC June 3, 1996) ("Second Report and Order"). Specifically, TELE-TV requests that the Second Report and Order be revised in two respects: First, the Commission should place all programming providers on an even footing by clarifying that the non-discrimination provisions of section 653(b)(1)(E) of the 1996 Telecommunications Act, Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996) ("Act"), apply exclusively to OVS operators and do not impose nondiscrimination duties on operator-affiliated programmers. Second, the Commission should require broadcasters to make the same election of must-carry or retransmission consent for cable and OVS operators to the extent they compete for the same subscribers.

I. THE APPLICATION OF NONDISCRIMINATION REQUIREMENTS TO OPERATOR-AFFILIATED PROGRAMMING PROVIDERS WOULD THWART COMPETITION IN PROGRAMMING PRESENTATION

The Commission has correctly interpreted section 653(b)(1)(E) to require the imposition of nondiscrimination obligations on OVS operators. Second Report and Order ¶¶ 225-230. However, it departed from both the letter and the spirit of the Act in extending these obligations to programming providers affiliated with OVS operators. Id. ¶ 231.

Some background on how entities such as TELE-TV actually intend to present programming over OVS platforms will illustrate the problem with the Commission's approach.[1] A typical OVS platform will require both a set-top box and a navigator. The set-top box is essentially a specialized computer. It contains the navigator, which is the software that allows the viewer to make programming choices from on-screen menus using a remote control or mouse-like device.

TELE-TV plans to use a sophisticated navigator that has been developed in conjunction with an equally sophisticated set-top box. The consumer will use the navigator to maneuver through a series of on-screen menus, just as he might use a mouse to

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[1]TELE-TV was formed by Bell Atlantic Corporation, NYNEX Corporation, and Pacific Telesis Group to, among other things, provide programming over the partner companies' video delivery systems. TELE-TV is engaged in negotiations with broadcasters and other programming vendors in an effort to secure rights to distribute their programming. TELE-TV also has been working with equipment vendors to develop and procure navigational software that will allow viewers to select programming quickly, easily, and intelligently, from the large array of offerings that will be available on digital video networks.

maneuver around the button bar on his personal computer. One (or more) of these menus will allow the user to perform channel selection functions; others will allow the user to customize the interface to show, for example, only a pre-selected group of programs. TELE-TV is spending hundreds of thousands of dollars to develop a distinctive navigator and menus that will both please the viewer and "brand" the programming as a TELE-TV offering. Many other programming providers are doing the same.[2]

The Commission "assumed" in its Second Report and Order that "a single navigational device will be used by subscribers to select programming carried on the open video system." Second Report and Order ¶ 224. But, as the above discussion suggests, this is not necessarily true. TELE-TV intends that its set-top box and navigator will be unique to TELE-TV, and will be compared by viewers to the set-top boxes and navigators used by other programming providers. Consistent with the strictures of section 653(b)(1)(E)(i), the operator of the open video system will ensure that viewers have the ability to choose between the competitive offerings of different programming providers in a nondiscriminatory fashion.

Only this function -- selecting between the offerings of different programming providers -- is subject to section

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[2]Other navigators that will compete with TELE-TV's include Viacom's Starsight, TV Guide On-Screen (owned by News Corp. and TCI), Stargazer, Prevue (owned by TCI), and Primestar (owned by a consortium of cable companies and General Electric). DirecTV, Oracle, Time Warner, and Microsoft are developing additional navigators.

653(b)(1)(E)(i). Under that paragraph, the Commission must promulgate regulations that prohibit an OVS operator from

> unreasonably discriminating in favor of the operator or its affiliate with regard to material or information (including advertising) provided by the operator to subscribers for the purposes of selecting programming on the open video system, or in the way such material or information is presented to subscribers.

Similarly, the Commission's regulations must ensure that "an operator of an open video system" does not "omi[t] television broadcast stations or other unaffiliated video programming services carried on such system from any navigational device, guide or menu." § 653(b)(1)(E)(iv) (emphasis added).

Congress provided that the nondiscrimination rules should prevent discrimination by the operator, § 653(b)(1)(E)(i), but legislators did not impose any duties on the affiliates themselves. And by expressly providing that an operator may not "unreasonably discriminate" in favor of "the operator or its affiliates," id., Congress clearly differentiated OVS operators and their affiliates, only to impose nondiscrimination obligations solely on the former. The Commission must presume that Congress did so for a reason, and give effect to that distinction. See Lowe v. SEC, 472 U.S. 181, 208 n.53 (1985) (courts "must give effect to every word that Congress used in the statute"). Congress's distinction also makes good sense. Operators are the better guarantors that information will be presented to subscribers in a nondiscriminatory fashion; it makes little sense to require a programming provider to provide nondiscriminatory access to its direct competitors.

An OVS operator could meet its section 653(b)(1)(E) obligations in a variety of fashions. For example, the operator could provide a menu listing all programming providers on the open video system. The operator could provide this menu itself, or contract to have a programming provider provide a channel that allows the end user to select other programming providers. But whatever arrangement is used, the OVS operator will have the burden of complying with the requirement of nondiscriminatory presentation and will "not be able to evade its obligations . . . simply by having the service nominally provided by its affiliate." Second Report and Order ¶ 231.

Following the scheme established by Congress will, moreover, effectuate the underlying goal of "foster[ing] competition by encouraging multiple programming sources on open video systems." Id. ¶ 2. Competition does not mean that the program-selection process for each and every programmer should look, sound, and operate alike, as would be the case if a single, "plain vanilla" navigator and menu, provided by the operator or its affiliate, were required. To the contrary, programming providers will seek to compete in large part on their distinctive "feel." These user interfaces will be a competitive battleground: They will allow OVS programming providers to attract viewers from other OVS programming providers as well as incumbent cable operators.[3]

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[3]Congress anticipated this sort of competition between programming providers, and thus required OVS operators to ensure programming providers' ability "suitably and uniquely to identify their programming services to subscribers." § 653(b)(1)(E)(ii).

The Commission's proposal to apply section 653(b)(1)(E)'s nondiscrimination requirements to operator-affiliated programmers would cripple TELE-TV's ability to compete with other OVS programmers in this way. TELE-TV, for instance, intends to deploy a navigator that will allow the viewer to customize his on-screen menus to list preferred programs. If TELE-TV is unable to present this customized menu to the consumer each time he turns on his television, see Second Report and Order ¶ 225, consumer choice will be undermined and the benefits of competition diminished. Moreover, under the Second Report and Order, TELE-TV will be unable to highlight its own programming in any fashion; by contrast, an unaffiliated programmer need not provide the viewer with a means of accessing TELE-TV's programming and could provide any type of menu it wished.

This will give unaffiliated programmers a dramatic competitive advantage. Yet the Commission has consistently recognized that placing similarly situated competitors on a level playing field will enhance competition and promote the public interest. In the wireless arena, for instance, the Commission has treated PCS and cellular providers alike, anticipating that consumers would benefit through competition in price as well as service features. Second Report and Order, Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Servs., 9 FCC Rcd 1411, 1463 (1994) (classifying PCS services as presumptively CMRS for the purpose of "establishing regulatory symmetry among mobile service

providers"). This is precisely what has happened. The recently deployed Washington D C./Baltimore area PCS system bundled paging, voice mail and wireless service into a competitive offering that is drawing customers from the incumbent cellular providers, who do not yet offer the same range of features.[4] This provides further vindication for the Commission's longstanding premise that "regulatory parity is an important policy that can yield important pro-competitive and pro-consumer benefits." Report and Order on Reconsideration, Petition of Arizona Corp. Comm'n to Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services, 10 FCC Rcd 7824, 7833 (1995).[5]

Consistent with that principle (and with the plain language of section 653(b)(1)(E)), programming providers affiliated with OVS operators should not be subject to the requirements of section 653(b)(1)(E). These obligations remain exclusively (and always) on the OVS operator. So long as the OVS operator provides, for example, a menu that displays all programming providers in a nondiscriminatory way and gives the viewer information on how to select any programming provider (see Second

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[4]See Edmund L. Andrews, Cellular Industry's Party Could End Soon, N.Y. Times, Mar. 27, 1996, at D2 (PCS providers offer lower prices and a menu of personal communication services including built-in paging, caller ID and voice mail).

[5]See also Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Servs., 9 FCC Rcd 1411, 1420 (1994) (similar regulation of entities providing similar services promotes competition and innovation, as opposed to "strategies in the regulatory arena").

Report and Order ¶230), and so long as the operator ensures that all viewers can access this information without undue difficulty using the navigational tools of their chosen programming provider(s), equal treatment of competing programming providers is assured and the requirements of section 653(b)(1)(E) are met. Each programming provider may then install a proprietary set-top box or share the box or navigator of another programming provider. Only by allowing this diversity of arrangements will the Commission fulfill Congress's aim of promoting competition free from unnecessary regulation.

II. BROADCASTERS SHOULD BE REQUIRED TO MAKE NON-DISCRIMINATORY ELECTIONS OF MUST CARRY/RETRANSMISSION CONSENT FOR COMPETING CABLE AND OVS OPERATORS

In the Second Report and Order, the Commission also concluded that there do not exist "sufficient technical or size differences between open video systems and large cable systems to warrant application of significantly different must-carry rules." Second Report and Order ¶ 166. Therefore, under the new rules, an open video system that spans multiple television markets generally will be subject to the same must-carry and retransmission consent rules as any cable system that spans multiple markets. See id. App. B (proposing new 47 C.F.R. § 76.1506(e), making provisions of 47 C.F.R. § 76.56(d)(2) applicable to OVS operators).

Yet, on the related question whether broadcasters must make a non-discriminatory election of must carry or retransmission consent for cable and OVS operators serving the same subscribers,

the Commission concluded that potential size differences between OVS and cable systems justify permitting broadcasters to discriminate against OVS. This is contrary to the Commission's determination that cable and open video systems will not be substantially different in size, and it is anticompetitive.

As we explained in our opening comments, broadcasters remain the dominant providers of television programming, accounting for nearly 50 percent of cable television viewing.[6] In one survey, approximately 64 percent of cable subscribers indicated that they would cancel their cable service if broadcast network programming were dropped.[7] Just recently, another survey showed that while 70 percent of consumers would be interested in subscribing to a satellite service if local programming were available, only 17 percent would want the service if they could not obtain local broadcast signals.[8] An OVS programming provider that is unable to offer broadcast programming that the competing cable system does carry plainly will be unable to compete effectively.

The Commission nevertheless concluded that "[t]elevision broadcast stations are not required to make the same election for

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[6]Reply Comments of TELE-TV, Implementation of Section 302 of the Telecommunications Act of 1996 -- Open Video Systems at 6, CS Docket 96-46 (FCC filed April 11, 1996). Including Fox and UPN brings this number to nearly 60 percent. See National Cable Television Association, Cable Television Factbook 5 (Fall 1995); First Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 9 FCC Rcd 7442, 7542 (1994).

[7]Ed Bark, Biggest Fight on TV Will Be Off Screen, Dallas Morning News, June 27, 1993, at 1C.

[8]Communications Daily, June 27, 1996, at 7.

open video systems and cable systems in the same geographic area." Second Report and Order, App. B (proposing new 47 C.F.R. § 76.1506(l)(3)). Thus, a broadcaster that gives its programming to a cable system for free under the must-carry regime can charge OVS programming providers as much as it likes for showing that same programming in the same market. If TELE-TV is required to bear substantial retransmission fees, it will be difficult for TELE-TV to compete. Id.

This discrimination is not sanctioned by any congressional policy. To the contrary, Congress has required that, when two or more cable companies serve the same geographic area, a broadcast "station's election shall apply to all such cable systems," § 325(b)(3)(B).[9] And it has further required that the Commission impose must-carry and retransmission consent rules that are, "to the extent possible," the same for cable and OVS. § 653(c)(2)(A).

In the cable context, the Commission has characterized the same-election provision as critical to encouraging competition among cable systems that compete with one another. Report and Order, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 2965, 3002 (1993). According to the Commission, "systems with overlapping franchise areas should be considered in the same geographic area. In this manner, not only actual but potential competitors will be placed

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[9] See also 47 C.F.R. § 76.64(g) (1996) ("If one or more franchise areas served by a cable system overlaps with one or more franchise areas served by another cable system, television broadcast stations are required to make the same election for both cable systems")

on a level playing field." Id. (footnotes omitted). Just the same logic applies here, where Congress's principal concern was establishing OVS as a viable alternative to cable. See S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 178 (1996) ("[T]he conferees hope that this approach [to OVS regulation] will encourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets").

The only explanation the Commission offers for permitting broadcasters to make different elections for competing cable and OVS systems is the "potential" that an open video system may be so large that it will overlap several cable systems whose franchise areas do not themselves overlap. Second Report and Order ¶ 169 (emphasis added). According to the Commission, this would effectively require a broadcaster to make the same election for non-overlapping cable systems, something that it is not now required to do. Id.

The Commission has made two critical errors. First, it assumes that the mere possibility that an open video system may be large requires that it be treated differently from cable systems. But for the moment, at least, the scope of future open video systems is unknown; no OVS systems have even been proposed. Open video systems may coincide with underlying cable franchise areas, or with multiple cable systems that have made the same election. Especially where the Commission has found that there do not exist dramatic "technical or size differences between open video systems and large cable systems," id. ¶ 166, it is simply

indefensible to justify departing from the requirements of section 653(c)(2)(A) just because open video systems ultimately might encompass multiple cable franchise areas.[10]

Second, the Commission incorrectly assumes that a single election must, as a practical matter, apply throughout an OVS operator's entire system. In fact, it may be possible for OVS operators and programming providers to distinguish among subscribers in different cable franchise areas, blocking out broadcast programming where necessary to comply with retransmission consent duties while providing that same programming in other areas where broadcasters have elected must-carry or a retransmission consent agreement has been signed. An open video system that serves the same geographic areas as cable systems A and B (which do not themselves overlap) thus could provide broadcast programming on a must-carry basis to subscribers in cable system A's franchise area, while, at the same time, withholding that programming in cable system B's franchise area until retransmission rights are secured.

The Commission's current rule of a separate election for cable and OVS will be appropriate until the OVS operator can certify to those broadcasters who have made inconsistent

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[10] "[A]n agency determination must have some evidentiary basis to avoid being held 'arbitrary and capricious.'" Aman v. FAA, 856 F.2d 946, 950 n.3 (7th Cir. 1988) (emphasis in original)). See generally Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency . . .").

elections for cable that its system is capable of operating in conformity with such elections. But where an OVS operator and OVS programming providers can distinguish among subscribers according to the cable franchise area in which they live, where the open video system coincides with a single cable franchise area, or where the open video system is coextensive with multiple cable areas where broadcasters have made consistent elections, broadcasters should be required to make the same retransmission election as was made for the competing cable operator(s). § 653(c)(2)(A). Anything less would be inconsistent with the Telecommunications Act.

CONCLUSION

The Commission should reconsider its Second Report and Order and exempt OVS programming providers from the nondiscrimination requirements of section 653(b)(1)(E). In addition, where cable operators and OVS operators are in direct competition for the same subscribers, broadcasters should be required to make the same election -- either must-carry or retransmission consent --

for both, provided the open video system operator certifies it will operate in conformity with that election.

Respectfully submitted,

Michael K. Kellogg
Austin C. Schlick
Kevin J. Cameron
Kellogg, Huber, Hansen,
Todd & Evans
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

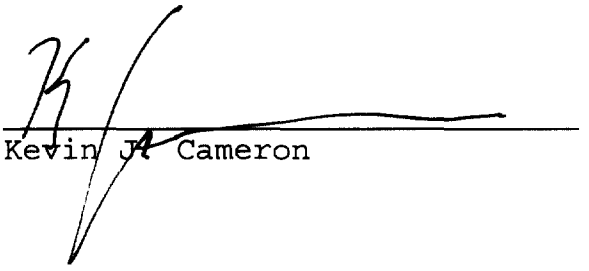
Karen Stevenson
TELE-TV
875 Third Avenue
15th Floor
New York, NY 10022
(212) 508-4000

Counsel for TELE-TV

July 5, 1996

CERTIFICATE OF SERVICE

I, Kevin J. Cameron, hereby certify that on this 5th day of July, 1996, copies of the Petition of Tele-TV for Reconsideration were served upon the parties listed on the attached service list by first-class mail, postage prepaid.



Kevin J. Cameron

Counsel of Record Service List

ORGANIZATION	ADDRESS
Small Business Administration	Small Business Administration Office of Advocacy P. O. Box 34500 Washington, D.C. 20043-4500
Access Houston Cable Corporation	R. Vince Hamilton General Manager Access Houston Cable Corporation 3900 Milam Houston, TX 77006
Access Sacramento	Ron Cooper Executive Director Sacramento Community Cable Foundation c/o Coloma Community Center 4623 T Street, Suite A Sacramento, CA 95819-4743
Access 2000	Samuel A. Simon 901 15th Street, N.W. Suite 230 Washington, D.C. 20005 Harvey Kahn 2656 29th Street Santa Monica, CA 90405
Access Tucson	Sam Behrend Executive Director Access Tucson 124 E. Broadway Tucson, AZ 85701
Adelphia Communications Corporation	Randall D. Fisher John B. Glicksman Adelphia Communications Corporation 5 West Third Street Coudersport, PA 16915

Suburban Cable TV Co., Inc.	Samuel W. Morris, Jr. Vice President Suburban Cable TV Co., Inc. 1332 Enterprise Drive Suite 200 West Chester, PA 19380 Fleischman and Walsh 1400 16th Street, N.W. Suite 600 Washington, D.C. 20036
Alliance for Community Media, et al.	Gigi B. Sohn Andrew Jay Schwartzman Media Access Project 2000 M Street, N.W. Washington, D.C. 20036 Jeffrey Hops Director of Government Relations Alliance for Community Media 666 11th Street, N.W. Suite 806 Washington, D.C. 20001 John Podesta Institute for Public Representation Georgetown University Law Center 600 New Jersey Avenue, N.W. Washington, D.C. 20001 James N. Horwood Spiegel & McDiarmid 1350 New York Avenue, N.W. Washington, D.C. 20005
American Cable Entertainment, et al.	John D. Seiver T. Scott Thompson Cole, Raywid & Braverman, L.L.P. 1919 Pennsylvania Avenue, N.W. Suite 200 Washington, D.C. 20006
Association of Local Television Stations, Inc.	James J. Popham Vice-President, General Counsel Association of Local Television Stations, Inc. 1320 19th Street, N.W. Suite 300 Washington, D.C. 20036

AT&T Corp.	Mark C. Rosenblum Ava B. Kleinman Seth S. Gross AT&T Corp. Room 3245F3 295 North Maple Avenue Basking Ridge, NJ 07920
Bartholdi Cable Company, Inc.	Henry M. Rivera Gregg A. Rothschild Ginsburg, Feldman and Bress 1250 Connecticut Avenue, N.W. Washington, D.C. 20036
Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company	Leslie A. Vial Bell Atlantic 1320 North Court House Road Eighth Floor Arlington, VA 22201
Boston Neighborhood Network	Hubert Jessup General Manager Boston Neighborhood Network 8 Park Plaza Boston, MA 02116
BroadBand Technologies, Inc.	Janice Obuchowski Halprin, Temple, Goodman & Sugrue 1100 New York Avenue Suite 650 East Washington, D.C. 20005
California Cable Television Association (CCTA)	Donna N. Lampert James J. Valentino Charon J. Harris Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. 701 Pennsylvania Avenue, N.W. Suite 900 Washington, D.C. 20004
Cambridge Community Television	Susan Fleischmann Executive Director Cambridge Community Television 675 Massachusetts Avenue Cambridge, MA 02139

Capital Cities/ABC, Inc.	Sam Antar Vice President, Law & Regulation Roger C. Goodspeed General Attorney, Law & Regulation Capital Cities/ABC, Inc. 77 West 66th Street New York, NY 10023
Chicago Access Corporation	Barbara Popovic Executive Director Chicago Access Corporation 322 S. Green Chicago, IL 60607
Cincinnati Community Video	Joyce Miller Executive Director Cincinnati Community Video 3130 Wasson Road Cincinnati, OH 45209
City of Ann Arbor, Michigan	Harry S. Haasch Cable Administrator City of Ann Arbor Office of Cable Communications 107 N. Fifth Avenue Ann Arbor, MI 48107
City of Boston, Massachusetts	Scott Dunlap Director Office of Cable Communications City of Boston 43 Hawkins Street Boston, MA 02134
City of Charlotte and County of Mechlenburg, North Carolina	Doris Boris Cable Communications Administrator Charlotte-Mechlenburg County 600 East Fourth Street Charlotte, NC 28202
City and County of Denver	Alonzo Matthews Manager General Services Administration City and County of Denver 1330 Fox Street 2nd Floor Denver, CO 80204

	Deborah L. Ortega President City Council Hiawatha Davis, Jr. City Councilman and Vice Chair, Special Projects City and County of Denver City and County Building Denver, CO 80202
City of Dayton, Ohio	M.L. Gordon Cable Administrator City of Dayton 101 West Third Street Dayton, OH 45402
City of Encinitas, California	Richard Phillips Management Analyst City of Encinitas 505 South Vulcan Avenue Encinitas, CA 92024
City of Indianapolis, Indiana	Rick Maultra Telecommunications Coordinator City of Indianapolis 200 East Washington Street City-County Bldg., Room G-19 Indianapolis, IN 46204
City of Kalamazoo, Michigan	Joan Burke Cable Administrator City of Kalamazoo 230 E. Crosstown Parkway Kalamazoo, MI 49001
City of Lake Forest, Illinois	Rhett W. Butler Mayor The City of Lake Forest 220 E. Deerpath Lake Forest, IL 60045
City of Laurel, Maryland	Ernest Zaccanelli City of Laurel, Maryland Office of the City Administrator 8103 Sandy Spring Road Laurel, MD 20707